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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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No. 367

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FRANK EICHHOLZ,

*Appellant,*

*vs.*

PUBLIC SERVICE COMMISSION OF THE STATE OF  
MISSOURI ET AL.

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF MISSOURI.

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MOTION FOR BOND.

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JAMES H. LINTON,  
DANIEL C. ROGERS,  
*Counsel for Appellees.*



SUPREME COURT OF THE UNITED STATES

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FRANK EICHHOLZ,

*vs.*

*Appellant,*

PUBLIC SERVICE COMMISSION OF THE STATE OF  
MISSOURI ET AL.,

*Appellees.*

---

**MOTION FOR BOND.**

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Appellee Public Service Commission of the State of Missouri moves the Court to enter an order requiring appellant Frank Eichholz forthwith to file a bond in said cause in the amount of twenty-five thousand (\$25,000.00) dollars, or in such lesser amount as the Court may deem adequate, to secure and protect appellee in the amount of fees now owing by appellant to the State of Missouri as compensation for the use of its public highways in interstate commerce.

PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI,

By JAMES H. LINTON,

*General Counsel.*

DANIEL C. ROGERS,

*Assistant Counsel.*

### **SUGGESTIONS IN SUPPORT OF MOTION.**

Appellee states that the Three-Judge District Court, as shown by its decree, appearing on page 81 of the printed record in this cause, took jurisdiction of the counterclaim filed by appellee Public Service Commission. At that time, May 10, 1938, the District Court appointed a special master to take an accounting of accrued and accumulating license fees, and other legal charges, if any.

Thereafter, on October 26, 1938, after several hearings had been held before the special master, the District Court made and entered the following findings of fact, conclusions of law, and judgment on the counterclaim of the Public Service Commission of the State of Missouri:

**"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION.**

In Equity.

No. 660.

**FRANK EICHHOLZ, Plaintiff,**

*vs.*

**PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI  
et al., Defendants.**

**Findings of Fact, Conclusions of Law, and Judgment on  
the Counterclaim of Defendant, Missouri Public Service  
Commission, Against Plaintiff.**

Having received and considered the Report of the Special Master appointed to take an accounting in connection with the Counterclaim of the Defendant, Missouri Public Service Commission, together with the evidence sent up by the Special Master, and having heard the arguments of counsel, the Court finds the facts as follows:

*Findings of Fact.*

1. The total number of vehicular operations of all classifications carried on by plaintiff and involved in Defendant's Counterclaim, on account of which the State of Missouri is entitled to fees, was 5875 operations.

2. Of the 5875 operations referred to in Finding of Fact No. 1, 3793 operations were 10-ton truck operations, subject to a payment of a \$4.50 "Travel-order" fee for each operation, and 2082 were 9-ton truck operations subject to a payment of a \$3.00 "Travel-order" fee for each operation.

3. The total amount due in fees to the State of Missouri for the operations referred to in Findings of Fact No. 1 and No. 2 is \$23,314.50.

*Conclusions of Law.*

The Court concludes as a matter of law that the State of Missouri is entitled to fees upon the operations referred to in the Findings of Fact, calculated upon the "Travel-order" basis, at the rate of \$4.50 per 10-ton truck operation and at the rate of \$3.00 per 9-ton truck operation, and that the total amount due the State of Missouri for the operations involved in the Counterclaim of the Missouri Public Service Commission is \$23,314.50.

*Judgment on Counterclaim.*

IT IS ORDERED, ADJUDGED AND DECREED that the defendant, Missouri Public Service Commission, have and recover for the State of Missouri from the plaintiff, on the Counterclaim of the Defendant, the sum of \$23,314.50, together with its costs.

KIMBROUGH STONE,  
*Circuit Judge.*

ALBERT L. REEVES,  
*District Judge.*

MERRILL E. OTIS,  
*District Judge."*

Inasmuch as the District Court has entered a judgment on the counterclaim in favor of the Public Service Commission, on behalf of the State of Missouri, in the amount of twenty-three thousand three hundred fourteen dollars and fifty cents (\$23,314.50), together with costs, it is suggested that equitable principles justify the request that this motion for adequate security against loss of license fees and costs should be sustained. One who seeks equity should be prepared to do equity.

Appellee states that two indemnifying bonds in the total amount of eleven thousand (\$11,000.00) dollars have been filed by appellant in the District Court. The first bond in the separate amount of one thousand (\$1,000.00) dollars was filed on February 22, 1937, very soon after the issuance of the temporary injunction by the District Court.

The second bond in the separate amount of ten thousand (\$10,000.00) dollars was filed on or about February 23, 1938. Its condition is that,

“Now, if the said Frank Eichholz shall pay all damages that may be occasioned by said restraining order or injunction and abide the decision which shall be made therein and pay all sums of money, damages and costs that shall be adjudged against him, if the injunction or restraining order be dissolved, then the above obligation to be void; otherwise to be and remain in full force and virtue.”

Such second bond was required by the District Court upon hearing on the motion of Public Service Commission that plaintiff's (appellant's) first bond should be increased to twenty-five thousand (\$25,000.00) dollars in order that the State of Missouri might be adequately protected and secured against loss of license fees for the use of the public highways by plaintiff (appellant) during the time he would use them, without paying any fees whatsoever, under the protection of the temporary restraining order. After hearing

statement of counsel of Public Service Commission in support of the higher bond and of counsel for Mr. Frank Eichholz against a bond in such higher amount, the District Court entered an order requiring the filing of an additional bond for only ten thousand (\$10,000.00) dollars.

On October 26, 1938, approximately eight months after entry of its order for an additional bond in the amount of ten thousand (\$10,000.00) dollars, the District Court, after reception of the report of the Special Master, entered its judgment on the counterclaim of the Public Service Commission of the State of Missouri in the amount of twenty-three thousand three hundred fourteen dollars and fifty cents (\$23,314.50), together with costs, as heretofore stated.

It is reiterated that equitable principles justify this motion for a further increase in appellant's bond. No step has been taken by him to appeal from the amount of the judgment on the counterclaim. Evidently he accepts the amount itself not only as accurate and just, but as final. On page 14 of his brief appellant states:

“Judgment on the counterclaim was also final. The act of ascertaining the amount due was a ministerial act in fulfillment of that judgment.”

He concedes he owes the State of Missouri twenty-three thousand three hundred fourteen dollars and fifty cents (\$23,314.50). He resists only the efforts of the Public Service Commission of the State of Missouri to recover such amount on behalf of the State. He seeks equity but is unwilling to do equity. Therefore, regardless of the outcome of the appeal on the injunction or the questions surrounding the counterclaim (*i. e.*, whether it lies within Equity Rule No. 30 or whether it can be maintained by the Public Service Commission or some other agent of the State of Missouri), the appellant should be required to place himself in a position to do equity to the State of Missouri for the amount of



money he concedes he owes to it, and as adjudged by the district court.

WHEREFORE, as a condition precedent to appellant's right finally to present his appeal to the Supreme Court of the United States, appellee prays said Court to require appellant to file such a bond as the Court deems sufficient to protect and secure the State of Missouri and this appellee in the premises.

PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI,  
By JAMES H. LINTON,  
*General Counsel.*  
DANIEL C. ROGERS,  
*Assistant Counsel.*

Service of within motion for bond and suggestions in support thereof is hereby acknowledged this 29th day of December, 1938.

D. D. McDONALD,  
FRANK E. ATWOOD,  
SMITH B. ATWOOD,  
*Counsel for Appellant.*

